No. 85-1716

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JEAN E. WELCH,

Petitioner

v.

STATE DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION AND
THE STATE OF TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME the State Department of Highways and Public Transportation and the State of Texas, respondents, by and through their attorney, the Attorney General of Texas, and file this Brief in Opposition.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED ARE UNWORTHY OF REVIEW

As provided in Supreme Court Rule 17, review on writ of certiorari is not a matter of right, but of judicial discretion, and

will be granted only when there are special and important reasons. In this case, there are none. To begin with, the Fifth Circuit and the Eleventh Circuit, the two courts of appeals that have considered the questions presented, have reached the same conclusion: a state is not subject to suit by an injured state maritime employee in federal court under the Jones Act. *Welch v. State Dep't of Highways,* 780 F.2d 1268, 1274 (5th Cir. 1986) (en banc); *Sullivan v. Georgia Dep't of Natural Resources,* 724 F.2d 1478, *reh'g en banc denied,* 729 F.2d 782 (11th Cir.), *cert. denied,* _____U.S._____, 105 S.Ct. 222 (1984).

Moreover, both courts of appeals applied the well-settled principles of Eleventh Amendment immunity announced by this Court, most recently in *Atascadero State Hospital & California Dep't of Mental Health v. Scanlon,* _____U.S._____, 105 S.Ct. 3142 (1985). There are no novel points of law for this Court to consider. Just as the Court denied a writ of certiorari to the Eleventh Circuit in *Sullivan,* it should deny a writ of ceritorari to the Fifth Circuit in *Welch.*

II. CONGRESS HAS NOT ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES IN THE JONES ACT.

A. *An unequivocal expression of congressional intent is required to find that Congress abrogated immunity.*

Before finding that a congressional statute abrogates immunity to suit in federal court, there must be a clear statement of congressional intent to apply the statute to the states. *Quern v. Jordan,* 440 U.S. 332, 337-46, 99 S.Ct. 1139, 1143-47 (1979). Indeed, the Court's most recent formulation requires that there be an "unequivocal expression of congressional intent." *Atascadero State Hospital & California Dep't of Mental Health v. Scanlon,* _____U.S._____, 105 S.Ct. 3142, 3147 (1985). To escape the application of this rule, petitioner relies upon the now discredited reasoning in *Parden v. Terminal Ry. of Ala. St. Docks Dept.,* 377 U.S. 184, 84 S.Ct. 1207 (1964). The *Parden* court reasoned that because the Federal Employers' Liability Act (FELA) was applicable to "every" common carrier, the FELA included state railroads. *Id.*

Four justices dissented in *Parden,* citing the clear statement rule. 377 U.S. at 198-200, 84 S.Ct. at 1216-17. The dissenters' view ultimately prevailed in *Employees of the Dept. of Public Health and Welfare v. Missouri,* 411 U.S. 279, 93 S.Ct. 1614 (1973). In *Employees* the question was whether the Fair Labor Standards Act subjected a state to suit. *Id.* Applying the clear statement rule, the court held it did not. *Id.* Thus, use of the correct rule of construction is critical to a proper decision. There must be a clear statement—an unequivocal expression—of congressional intent.

Petitioner argues that the clear statement rule of *Atascadero* does not control this case because the Rehabilitation Act in question in *Atascadero* was enacted pursuant to congressional power under the Fourteenth Amendment, while the Jones Act in question in the case at bar was enacted pursuant to congressional power over admiralty. A clear statement is not necessary to abrogate Eleventh Amendment immunity in admiralty, petitioner implicitly reasons, because admiralty power is somehow more pervasive or stronger than Fourteenth Amendment power.

Petitioner's argument fails in its premise. Congress has admiralty power only by inferring congressional authority through the necessary and proper clause in article I, § 8, and only to the extent that such power is necessary and proper to effectuate the grant of *judicial* power over admiralty in article III, § 2. *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 36, 39-40, 63 S.Ct. 488, 490 (1943); *Southern Pacific v. Jensen,* 244 U.S. 205, 214-15, 37 S.Ct. 524, 528 (1916). This judicial power, however, does not extend to the states because of the Eleventh Amendment. *In re State of New York,* 256 U.S. 490, 41 S.Ct. 588 (1921). Because congressional power to reach the states under the necessary and proper clause of article III can be no broader than the article III judicial power from which it is derived, congressional admiralty power is likewise limited by the Eleventh Amendment.

Petitioner's argument that a lesser showing of intent to abrogate is required in admiralty cases than in Fourteenth Amendment cases is, therefore, exactly backwards. While congressional power over admiralty is limited to what is necessary

and proper to effectuate article III judicial power, section 5 of the Fourteenth Amendment expressly grants Congress the power "to enforce, by appropriate legislation, the provisions of this article." Since the whole point of the Fourteenth Amendment is to limit state power, its grant of congressional power to enforce its provisions necessarily includes the power to abrogate state immunity. Thus, Congress has more power over the states under the Fourteenth Amendment than it has under article I, § 8, to implement article III, § 2. Therefore, if a clear statement is required to find abrogation of immunity in Fourteenth Amendment cases, a fortiori a clear statement is required in admiralty cases.

B. *The Jones Act is not an unequivocal expression of congressional intent.*

1. *The general term "any seaman" does not unequivocally include state seaman.*

Accepting the clear statement rule, petitioner argues that the provision that "*any* seaman" may bring suit clearly includes state seaman. However, general terms (for example, person, persons, bodies politic, etc.) are not unequivocal expressions. *United States v. United Mine Workers of America*, 330 U.S. 258, 272-73, 67 S.Ct. 677, 686 (1947). By their very nature, general terms do not show the specific contemplation required to abrogate immunity. *Id.*

Petitioner, however, cites *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 282-83, 79 S.Ct. 785, 791 (1959), for the proposition that Congress intended to include the states in the class of employers subject to the Jones Act by providing that any seaman could sue his employer. *Petty* is of no use for three reasons. First, *Petty* turned on consent to suit; the finding that the states were included in the Jones Act was an afterthought, an alternative rationale. 359 U.S. at 276-84, 79 S.Ct. 787-90. Second, only three of nine justices joined in holding that the states were included in the Jones Act. Three other justices joined in the judgment but specifically refused to reach the Eleventh Amendment issue, having found consent to suit. 359 U.S. at 283, 79 S.Ct. at 791. Three justices dissented, also refusing to reach the issue of whether the Jones Act includes

the states. 359 U.S. at 289, 79 S.Ct. at 794. Finally, the three justices who did conclude that the Jones Act applied to the states did not employ the clear statement rule. 359 U.S. at 282-83, 79 S.Ct. at 790. Given that stare decisis has limited application in a case of constitutional immunity, *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 1395-60 (1974), this three-justice-alternative-holding should be completely disregarded in light of the development of the clear statement rule.

Thus, the general authorization in the Jones Act that "any seaman" may bring suit, like the general authorization in the Civil Rights Act that "every person" shall be liable, is not a sufficiently clear statement from which to conclude that Congress intended to abrogate the immunity of the states. *See Quern v. Jordan*, 441 U.S. at 340-45, 99 S.Ct. at 1145-47.

To counter these precedents, petitioner relied in the court of appeals upon *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978), for the proposition that language no more specific than that of the Jones Act abrogated immunity in the Civil Rights Attorneys' Fee Award Act, 42 U.S.C. § 1988. The petitioner, however, ignores the *Hutto* court's express and heavy reliance on legislative history to find an abrogation of immunity. *See Hutto v. Finney*, 437 U.S. at 698 n.31, 98 S.Ct. at 2577 n.31. General language coupled with express legislative history may be the "unequivocal expression of congressional intent" required. General language alone, however, is not. *Compare Quern v. Jordan*, 440 U.S. at 340-45, 99 S.Ct. at 1145-47, *with Hutto v. Finney*, 437 U.S. at 698, 98 S.Ct. at 2577.

2. *The incorporation of the FELA is not an unequivocal expression of congressional intent.*

Not finding a clear statement in the terms of the Jones Act, petitioner turns to a theory of incorporation. The Jones Act incorporates the Federal Employers' Liability Act, 45 U.S.C. § 51, as follows:

> *Any seaman* who shall suffer personal injury in the course of his employment *may*, at his election, *maintain an action* for damages at law, with the right of trial by

jury, and *in such action* all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right to trial by jury, and *in such action* all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

46 U.S.C. § 688 (emphasis added).

Petitioner offers a two-step argument as to why the incorporation of the FELA is congressional abrogation of immunity to a Jones Act claim. First, petitioner notes, the FELA authorizes suit against the state when the state employs a railwayman. *See Parden*, 377 U.S. at 184, 84 S.Ct. at 1207. Second, petitioner argues, because the Jones Act incorporates the FELA, the Jones Act must authorize a suit against the state when the state employes a seaman.

Petitioner's argument is flawed. The Jones Act does not incorporate the FELA as to *who* may sue. A careful examination of the portion of the Jones Act *underscored* above reveals that the Jones Act incorporates the FELA standards of liability as to "such action" authorized by the Jones Act. The Jones Act, however, does not incorporate the FELA to define who may sue or be sued. The statute defines who may sue or be sued only by the terms "Any seaman...may...maintain an action...." As noted, this general authorization is not an unequivocal expression. Incorporation of the FELA merely extends to seaman who may maintain an action the remedies available to railway workers, and thereby obliterates the traditional distinctions between the kinds of negligence for which a shipowner is liable. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 545-48, 80 S.Ct. 926, 930-31 (1960).

Moreover, when Congress enacted the Jones Act in 1920, it had no idea that the FELA, earlier enacted in 1908, would be

held in 1964 in *Parden to authorize a railway employee to sue a state employer. Parden* itself was not based upon any unequivocal expression of congressional intent in the FELA, but upon the now discredited theory of applying the federal statute to a state entering into a federally regulated sphere of activity. 377 U.S. at 196, 84 S.Ct. at 1215. While as a matter of stare decisis the holding in *Parden* may have vitality, its discredited rationale has been laid to rest and should have no force beyond its grave. Thus, the incorporation of the FELA in the Jones Act is not an unequivocal expression of congressional intent to abrogate the immunity of the state.

3. *The legislative history of the Jones Act does not contain an unequivocal expression of congressional intent.*

As noted earlier, the legislative history of a statute may contain an unequivocal expression of congressional intent. Indeed, when Congress intends to abrogate the constitutional right of state immunity, one would expect the legislative history of the statute in which it does so to reflect this intention. *Quern v. Jordan*, 440 U.S. at 343, 99 S.Ct. at 1146. As noted by the district court, however, petitioner in this case points to nothing in the legislative history of the Jones Act to suggest that Congress intended to authorize suits against the states. *Welch v. State Dep't of Highways*, 533 F.Supp. 403, 406 (S.D. Tex. 1982).

The respondents have undertaken an independent and complete examination of the legislative history of the provision in question—46 U.S.C. § 688. In its present form, this provision became law in 1920 and has never been amended. It is commonly known as the Jones Act and was part of the Merchant Marine Act of 1920. The legislative history reveals no intention to abrogate immunity or create a private remedy against the states. *See Providing for the Disposition, Regulation, or Use of Property Built or Acquired by the United States: Hearings of H.R. 10378 Before the House Comm. on the Merchant Marine and Fisheries*, 66th Cong., 1st Sess. (1919); *Establishment of an American Merchant Marine: Hearings Before the Senate Comm. on Commerce*, 66th Cong., 2d Sess. (1919-1920); H.R. Rep. No. 443, 66th Cong., 1st Sess. (1919); H.R. Rep. No. 1093, 66th Cong., 2d Sess (1920); H.R. Rep. No. 1102, 66th

Cong., 2d Sess. (1920); H.R. Rep. 1107, 66th Cong. 2d Sess. (1920); S. Rep. No. 573, 66th Cong., 2d Sess. (1920); 59 Cong. Rec. 6494, 6803-6816, 6857-6869, 6984-6994, 7036, 7043-7048, 7163, 7164, 7198, 7211, 7223-7227, 7274, 7291, 7293-7296, 7326, 7334, 7336, 7347-7356, 7409-7420, 7504, 8163, 8182, 8290, 8334, 8338, 8412, 8442, 8465-8470, 8487, 8489, 8493, 8572, 8576, 8588-8609, 8620, 8622, 8678, 9360, 9367 (1920). *See also The Establishment and Development of an Adequate Merchant Marine as Suggested by the United States Shipping Board: A Communication to Hon. Wm. S. Greene, Chairman of the House Comm. on the Merchant Marine and Fisheries,* 66th Cong., 1st Sess. (1919); *President's Message to Congress on the American Merchant Marine,* H.R. Doc. 201, 67th Cong., 2d Sess., 9 (1922).

What the legislative history does reveal is that the Merchant Marine Act of 1920 was adopted to address two post-World War I problems: an inadequate merchant marine and a surplus of navy vessels. S. Rep. No. 573, 66th Cong., 2d Sess., 1, 4 (1920); H.R. Rep. 443, 66th Cong., 1st Sess., 2 (1919). These two concerns dominate the legislative history. The provision now before the court, 46 U.S.C. § 688, received scant attention. *See* G. Gilmore & C. Black, *The Law of Admiralty* § 6-20 at 327 (2d ed. 1975).

Because it is inconceivable that the representatives of the several states would have passed a provision intended to abrogate the constitutional right of state immunity without comment, one can only conclude that they did not intend this provision to apply to state seamen. Thus, nowhere is there the clear statement required to abrogate immunity.

CONCLUSION

WHEREFORE, for all these reasons, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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